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Supreme Court of the United States.

OCTOBER TERM, [illegible]

No. 211.

NORTHERN PACIFIC RAILWAY COMPANY,

vs.

ALAINE A. DIXON, *Administratrix of the Estate of* CHAUMONT A. DIXON, *Deceased.*

CERTIFICATE FROM THE SUPREME COURT OF APPEALS OF THE STATE OF [illegible].

BRIEF FOR NORTHERN PACIFIC RAILWAY COMPANY.

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NORTHERN PACIFIC RAILWAY COMPANY,

vs.

ALLINE A. DIXON, *Administratrix of the Estate of* CHAUNCEY A. DIXON, *Deceased.*

STATEMENT.

This action was brought in the Circuit Court of the United States for Minnesota by Alline A. Dixon, as Administratrix, to recover damages for the death of Chauncey A. Dixon. She recovered a judgment for $3,500.00, which was taken by writ of error to the Circuit Court of Appeals for the Eighth Circuit, where two questions were certified to this Court.

> *First.* When a local telegraph operator is called upon specially by a train despatcher to give information relative to the arrival of a train at his station, to enable the despatcher

to formulate orders for the movement of other trains, does the local operator in the matter of giving such information act as a fellow servant of train operatives in such sense that the master is not liable to train operatives who are injured by obeying an erroneous order of the despatcher that was induced by false information given by the local operator?

Second. Is the negligence of a local telegraph operator and station agent of a railway company in observing and reporting by telegraph to the train despatcher the movement of trains past his station, which causes the injury or death of a fireman of the company without any fault or negligence of the train despatcher, the negligence of a vice principal for which the railway company is liable in damages to the fireman or his personal representatives, or is it the negligence of a fellow servant of the fireman the risk of which the latter assumes?

The certificate of the court gives a brief statement of the facts substantially as follows:

The Railway Company was operating its railroad in Montana and had made and promulgated time tables for its regular trains and had adopted reasonable rules for the operation of all its trains. The time tables did not and could not provide for the running of extra trains. The Railway Company had in its employ a train despatcher at Missoula, Montana, who had general power and sole authority to make and promulgate orders for the running of those trains, which were not covered by the time tables. A large proportion of the freight trains were run as extra trains and the times of their arrivals and departures were not shown on the regular time

tables. Their movements were made upon telegraphic orders issued by the train despatcher upon information furnished by telegraph to the despatcher by station agents and operators along the line of the railroad. All these facts were well known to the deceased.

One of the rules of the company was:

> "Operators will promptly record in a book to be kept for the purpose and report to the superintendent, the time of arrival and departure of all trains and the direction in which extra trains are moving."

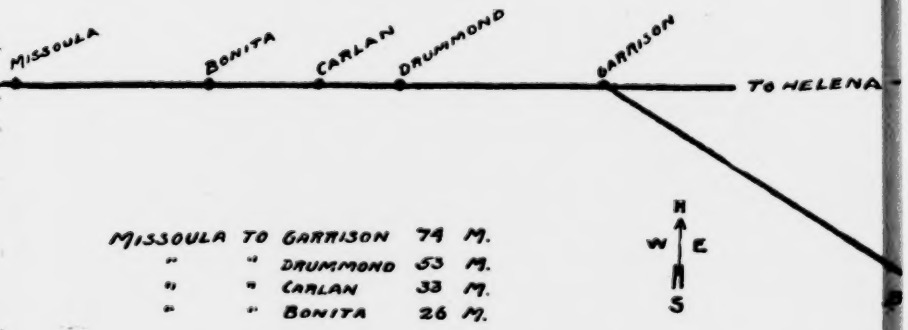
The reports mentioned in this rule were made to the train despatcher and he was vested with the authority of the superintendent to issue orders for the movement of trains.

On the evening of December 24, 1899, extra freight train No. 162 on which Dixon was fireman was running east and extra freight train No. 159 was running west on the railroad of plaintiff in error. Both were running on special schedules not included in the time tables and under the telegraphic orders of the train despatcher at Missoula in accordance with the rules of the company. No. 162 left Missoula going east at 10:20 p. m. Its destination was Helena, Montana. Bonita is a station 26 miles east of Missoula; Carlan a station 33 miles east of Missoula; Drummond a station 53 miles east of Missoula, and Garrison is a station 74 miles east of Missoula. No. 159 was east of Garrison under orders to run west to Garrison. The only telegraph offices open during the night between Missoula and Garri-

son were those at Bonita and Drummond. It was the duty of the telegraph operator and station agent at Bonita to observe the movement of trains passing his station during the night and to advise the train despatcher at Missoula of their movements. Extra freight train No. 162 arrived at Bonita at 12:35 a. m., and left there at 12:50 a. m. on December 25, but the local operator and station agent was asleep and did not know of, or report its passage and none of the crew on that train were aware of the fact that extra No. 159 was coming west. The railroad had but one track. At 1:05 a. m. No. 159 reached Garrison and that fact was reported to the train despatcher. Thereupon he asked the telegraph operator (station agent) at Bonita by telegraph whether extra freight No. 162 had arrived there, and the operator promptly answered that it had not. The train despatcher then ordered the train crew of No. 159 to run extra from Garrison to Missoula and to meet No. 162 at Carlan, and this order was duly received by that crew at Garrison. At the same time he ordered the crew of No. 162 to meet No. 159 at Carlan and sent this order to the operator (station agent) at Bonita to deliver to them. At the same time he ordered a red signal displayed at Drummond to stop No. 159 there so that the meeting point could be changed on its arrival there if necessary. These orders were complete at 1:18 a. m. At 1:20 a. m. No. 159 left Garrison and arrived at Drummond at 1:57 a. m.; the train despatcher was immediately informed of this fact. He then inquired of the operator (station

agent) at Bonita whether extra freight No. 162 had arrived at Bonita yet and the latter promptly replied "No sign of them yet." He then asked the operator if he was sure No. 162 had not passed and the latter replied yes. The train despatcher again repeated his inquiry and the operator at Bonita answered, "Yes, I am sure extra 162 has not passed." Thereupon the train despatcher issued an order to the crew of No. 159 to meet No. 162 at Bonita and an order to the crew of No. 162 to meet No. 159 at Bonita and sent the former order to Drummond and the latter to Bonita. The crew of No. 159 received their order and proceeded with their train. It collided with No. 162 and Dixon was killed by the collision about four miles west of Drummond at 2:15 a. m.

The above statement will be made more clear by the following diagram.



ARGUMENT.

The questions certified should not be regarded as open questions in this court. In principle the case seems to us like several which the court has passed upon.

In the case of *B. & O. Railroad v. Baugh*, 149 U. S. 368, where the injured servant, a fireman, was subject to the orders of the engineer, it was held that they were fellow servants; and the principle to control such cases was settled to be, in the language of the opinion, p. 387:

> "Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

In the same case (p. 385) the court, in defining what are the positive duties of a master to his servants, said:

> "Obviously, a breach of positive duty is personal neglect; and the question in any given case is, therefore, what is the positive duty of the master? He certainly owes the duty of taking fair and reasonable precautions to surround his employe with fit and careful co-workers, and the employe has a right to rely upon his discharge of this duty. If the master is careless in the matter of employing a servant,

it is his personal neglect; and if without proper care in inquiring as to his competency he does employ an incompetent person the fact that he has an incompetent, and, therefore, an improper employe is a matter of his personal wrong, and owing to his personal neglect. And if the negligence of this incompetent servant works injury to a co-servant, is it not obvious that the master's omission of duty enters directly and properly into the question of responsibility? If, on the other hand, the master has taken all reasonable precautions to inquire into the competency of one proposing to enter into his service, and as the result of such reasonable inquiry is satisfied that the employe is fit and competent, can it be said that the master has neglected anything, that he has omitted any personal duty; and this, notwithstanding that after the servant has been employed it shall be disclosed that he was incompetent and unfit? If he has done all that reasonable care requires to inquire into the competency of his servant, is any neglect imputable to him? No human inquiry, no possible precaution, is sufficient to absolutely determine in advance whether a party under certain exigencies will or will not do a negligent act. So it is not possible for the master, take whatsoever pains he may, to secure employes who will never be guilty of any negligence. Indeed, is there any man who does not sometimes do a negligent act? Neither is it possible for the master, with any ordinary and reasonable care, always to secure competent and fit servants. He may be mistaken notwithstanding the reasonable precautions he has taken Therefore, that a servant proves to be unfit and incompetent, or that in any given exigency he is guilty of a negligent act resulting in injury to a fellow-servant, does not of itself prove any omission of care on the part of the master in his employment; and it is only when there is such omission of care, that the master

can be said to be guilty of personal wrong in placing or continuing such servant in his employ, or has done or omitted aught justifying the placing upon him responsibility for such employe's negligence.

"Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employe in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employe by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable precaution shall be taken to secure safety in those respects."

The court in *Northern Pacific Railroad v. Peterson*, 162 U. S. 346, following the *Baugh case* again enumerated (p. 353) the positive duties of a master, saying:

"The general rule is, that those entering into the service of a common master become thereby engaged in a common service and are fellow-servants, and, *prima facie*, the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters it is a neglect of a duty which he personally owes to his employes, and if the employe suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such."

In *New England Railroad Co. v. Conroy*, 175 U. S. 323, the court reviewing all its prior decisions overrules *Chicago, Milwaukee & St. Paul Ry. Co. v. Ross*, 112 U. S. 377. Since this decision it seems

no longer permissible to doubt the controlling character of the test of liability given in the above extracts from the opinions.

In the last case the court quotes at length from and approves the opinion of Chief Justice Shaw in *Farwell v. Boston & Worcester Railroad*, 4 Met. 49, and approves, on p. 331, the following statement of Lord Chancellor Cairns:

> "The master is not and cannot be liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master."

In *Quebec Steamship Company v. Merchant*, 133 U. S. 375, the ship's company consisted of 32 persons divided into three classes of servants, called the deck department, the engineer's department and the steward's department. The accident in question was caused by the negligence of a carpenter inflicting an injury upon the stewardess. But it was held that they were fellow servants engaged in the same common employment. It was decided in *Oakes v. Mase*, 165 U. S. 363, that

the relation of fellow servant existed between the engineer of one train and the conductor of another train. In *Northern Pacific Railroad Co. v. Poirier*, 167 U. S. 48, a brakeman of a regular train and the conductor of an extra were held fellow servants, and in *Northern Pacific Railroad Co. v. Charless*, 162 U. S. 359, a day laborer at work on the track was held to be a fellow servant with the engineer and conductor of a train. In the leading case of *Farwell v. Boston & Worcester Railroad Corporation*, approved by this court in *New England Railroad Co. v. Conroy*, it was held that those employed on the trains of a railroad are fellow servants with those engaged to tend the switches.

Whether there is any exception to the principle, that to make the master liable the negligent act must be in respect of some thing wherein the master owes a positive duty to the servant, it is not necessary to inquire. That is, it is not necessary in this case to say whether the master may, regardless of the principle stated, be liable for the act of one placed at the head of a department. For the decisions already made by this court are conclusive that the departmental exception (if there is any such) does not arise as between servants all of whom are engaged in the general purpose of operating trains. The telegraph operators, the switchmen, signalmen, flagmen and trainmen are all in what is spoken of by Mr. Justice Brewer in the *Baugh case* as the operating department; they are all engaged in moving the trains. The relation between train-

men and telegraph operators in this work cannot be distinguished from the relation between trainmen and switchmen or other signalmen. The telegraph operator is a signalman. It is his duty to set out signals and to communicate telegraphic orders to the trainmen; also to learn from the trainmen and his own observation the movement of trains and convey such information to the superintendent or despatcher.

To hold that a telegraph operator and a trainman are not fellow servants, the proposition must first be established that the master owes a positive and personal duty to servants in respect of the collection of the information upon which the despatcher's train orders are based, and in respect of the communication of train orders to the train men. But that proposition seems to be precisely contrary to what the court has often decided. Beyond the duty of the master to provide the servant with a reasonably safe place to work and with reasonably safe machinery, and possibly to adopt and promulgate safe and proper rules for the conduct of business (*Northern Pacific Railroad v. Peterson, supra*), the obligation of the master is only to select competent servants. The master has not contracted or undertaken to execute in person the work connected with the business. The record states that the railway company in this case had adopted reasonable rules for the operation of all its trains, and the time tables did not and could not provide for the running of extra trains. These trains had to be moved upon telegraphic orders based upon information furnish-

ed by the station telegraph operators to the despatcher who issued the orders. And these facts were well known to the deceased.

A telegraph operator has neither power nor authority to make rules, give orders, or in any way control or direct the trainmen or the business. He is only the medium through whom orders are communicated and by whom information from and of the trains is communicated to the superintendent or despatcher. If an engineer telegraphs through the station agent to the despatcher, the duty of the station agent in that case is no different from that of a switchman who signals that a switch is thrown, or from that of a brakeman who communicates information or orders by signal or otherwise between conductor and engineer. The duty of the telegraph operator is merely to give notice or convey information. Such notice or information is also communicated by means of flagmen, trainmen, signalmen, lights on signals or on trains, and in other ways and is a necessary part of the movement of the trains. The subordinate employes whose duty it is to convey such information are engaged at the same time and place with the persons operating the trains in a common employment having one immediate object, the running of the trains. They are therefore fellow servants. No man giving signals or passing information from one employe to another exercises the discretion or judgment or control of the master, but each contributes his part to the safe running of the trains. Taft. J., in *Balti-*

more & Ohio Railroad Co. v. Camp, 31 U. S. App. 213, 236.

The case of *Camp* just cited discusses the prior decision of the same court in *Cincinnati, New Orleans & Texas Pacific Railroad Co. v. Clark's Administrator*, 16 U. S. App. 17. There an engineer was injured by the failure of a telegraph operator to signal to him that a train had passed less than ten minutes before. In that case it was decided that the station agent in conveying information of facts within his own observation was within the principle of *Randall v. Baltimore & Ohio Railroad Co.* 109 U. S. 478, a fellow servant of the engineer. In the *Camp case* the court held that there was no distinction between the failure of the station agent properly to communicate orders and his negligence with respect to facts within his own observation which it was his duty to communicate, saying on page 241:

> "The duty of the company is to provide general time tables and general rules and rules for all possible emergencies, and to communicate them to its employes affected by them, because this is reasonable and possible. The circumstances are such and the time within which the communication can be made is so ample that the company can have no excuse for failing to make it. But an employe who enters the service of a railway company knows that the transmission of a temporary change in the time table occasioned by an emergency, and calling for immediate action, must be through telegraph operators and signalmen who are stationed along the road, working with him at the same time and place for the immediate common object of running trains, and therefore he must

be held to assume the risk of negligence in those persons thus engaged with him in exactly the same work. The only obligation which the company can be held to with respect to the communication of a sudden and temporary change in the running times of trains by telegraphic order is that, so far as those who represent the company are concerned, all reasonable care shall be taken in transmitting notice of the temporary change.

"Meeting exactly the same contention in *Slater v. Jewett*, 85 N. Y. 61, 72, Chief Justice Folger, after fully conceding the master's duty to see and know that his general time table is brought to the knowledge of his servants who are to square their actions to it, said: 'It is not true that, on an occasion like this, it is the duty of the master, or a part of his contract, to see to it, as with a personal sight and touch, that notice of a temporary and special interference with a general time table comes to the intelligent apprehension of all those whom it is to govern in the running of approaching trains. It is utterly impracticable so to do, and a brakeman or a fireman on a train knows that it is, as well as any person connected with the business. He knows that trains will often and unexpectedly require to be stopped and started by telegraphic orders from distant points, and that such orders must, from the nature of the case, be given through servants skilled in receiving and transmitting them. If there is due care and diligence in choosing competent persons for that duty, a negligence by them in the performance of it is a risk of the employment that the co-employe takes when he enters the service. Such a variation, and the giving notice of it, is not like the supply of suitable machinery, or of competent and skilled fellow-workmen. It is the act of an hour or of an instant which for any useful effect to be got from it must be done at the instant, and

> that, too, from a distance. * * * The reasonable rule in such case hath this extent, and no more, that he (the master) must first choose his agents with due care for their possession of skill and competency, and that then he must use the best means of communication, according to prescribed general rules and regulations devised from the best experience in such business, and if among those means is the service of a fellow servant, competent for his place, his possible carelessness is a risk of the employment that his fellows take when entering into the service.' "

In the case under consideration the precise negligence of the operator was his failure to observe and report to the despatcher the passage of a train by his station, which resulted in the despatcher giving orders for another train to move in the opposite direction. The operator was as much a fellow servant of the fireman in the performance of the duty of observing the passage of trains by his station and reporting to the despatcher, as in communicating orders of the despatcher to trainmen. Indeed in communication of orders an operator seems *more nearly* a vice principal than in this case (31 U. S. App. 240). The trainmen know that in the ordinary course of business the despatcher in directing the movement of trains must necessarily rely upon the observation and report of station operators, and they know that if an operator is negligent and fails to observe and report correctly the natural and probable result is wrong orders and a collision. In entering the employment they therefore assume the

risk of injury caused by negligence of station operators in the performance of this duty.

This precise question was passed upon by the Circuit Court of Appeals of the Sixth Circuit in the case of *Illinois Central Railroad Company, v. Bentz*, 40 C. C. A. 56, where a failure of the telegraph operator to keep the train despatcher advised as to the whereabouts of a train was, as in this case, the cause of wrong orders resulting in a collision. The Court, Taft, Lurton and Day, judges, held that the case was controlled by *Railroad Company v. Camp, supra*, between which and it there was no distinction. See also *Railroad Company v. Frost*, 44 U. S. App. 606; *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38; *Sutherland v. Troy & Boston Railroad Co.*, 125 N. Y. 737.

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James B. Kerr.